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No. 98-1648

IN THE

Supreme Court of the United States

GUY MITCHELL, *et al.*,

Petitioners,

v.

MARY L. HELMS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NICHOLAS P. MILLER
110 N. Washington Street
Suite 404
Rockville, MD 20850
(301) 294-8766

LEE BOOTHBY
Counsel of Record
BOOTHBY & YINGST
4545 42nd Street, NW
Suite 201
Washington, DC 20016
(202) 363-1773

Counsel for Respondents

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

QUESTION PRESENTED

Whether a general educational aid program which includes separate allocations to participating sectarian elementary and secondary schools and is administered by a local educational agency so as to permit the recipient sectarian schools to select for their use educational equipment and materials capable of diversion to sectarian or general school administrative uses, as well as library books and other materials prescreened only by title and not content, violates the Establishment Clause especially when those items are placed under the immediate and continuing control of the religious school authorities and are not of a nature generally intended for continuing use by an individual student.

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STATEMENT OF THE CASE

Under the Jefferson Parish Chapter 2 program, pervasively sectarian elementary and secondary schools were given the authority to select large quantities of instructional equipment[1] (such as overhead and movie projectors, television sets, and VCRs, tape recorders, filmstrips, cassettes, computers, globes, as well as library books and resource material). These items were dutifully ordered without question by the school district and placed under the direct and immediate control of sectarian authorities. *See* S.J. Vol. 1, Lewis Dep. Exs. 4 and 5; Vol. II, Woodward Dep. Ex. 1; Vol. VI, Kropog Dep. Exs. 2, 8, 9 and 10; Vol. II, Woodward Dep. at 28-29; Vol. V, Junkin Dep. at 124-31.

Petitioners contend that as of the close of the record in 1990, the only Chapter 2 benefits that were provided to nonpublic schools in Jefferson Parish were library books, instructional materials, reference materials, and computer software and hardware. Pet. at 5. But this assertion was made in petitioners' summary judgment declaration *after* the close

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[1]As the court of appeals pointed out, "while the LEAs 'handle most of the administrative matters related to Chapter 2, the nonpublic schools make the decisions about how to spend their Chapter 2 allocations, and they do so independently of one another.'" The court also noted that "[e]xcept that funds cannot be spent for support of religious or ideological instruction, flexibility in the use of Chapter 2 funds puts a minimum of limitations on the kinds of expenditures allowed." Pet. App. at 57a. As the Fifth Circuit noted, "during the 1986-87 fiscal year, for example, of the total amount of $94,758 was spent to provide library/media materials, $102,862 was spent for instructional equipment, and $16,460 was spent for "local improvement programs." *Id.*

of discovery and only represented the school year in progress when the summary judgment cross-motion was filed.

More importantly, the nonpublic schools have in the past and could in the future order the same types of items they had selected year after year. S.J. Vol. II, Lewis Dep. at 22-28. In fact, during the 1988-89 school year, the nonpublic schools in Jefferson Parish ordered 29 television sets, 34 VCRs, 23 computers, 3 video cameras, and 7 cassette players. S.J. Ex. 33.

Respondents contend that the providing of educational equipment (with or without the inclusion of computers), materials (with or without computer software), and library books and resource materials to pervasively sectarian elementary and secondary schools is unconstitutional for two separate and distinct constitutional reasons: (1) it provides direct aid; and (2) the items furnished are easily divertable to religious and sectarian school administrative purposes.

When library books are ordered in Jefferson Parish under Chapter 2, only the title of the book is reviewed. No inspection of the book's content is made to ascertain if there is any sectarian or values clarification information contained in the book. S.J. Vol II, Woodward Dep. at 67-68. And this is the practice even though, in 1985, 191 books ordered by sectarian schools were found to be religious or sectarian by their titles. *Id.* at 69-74. Further, no review is made of audio-visual material to determine whether orders made by sectarian schools are secular and nonideological. *Id.* at 86.

Even after finding and removing a large quantity of books religious in character, Ruth Woodward, who administers the Jefferson Parish Chapter 2 program, merely wrote the sectarian schools saying the books ordered should be secular,

neutral, and nonideological in content. *Id.* at 83-84, 88. Following the 1985 incident, the *only* prescreening made by the school district was a crossing out on the book order form of any title that appeared not to be secular, but no further inquiry was made. *Id.* at 90.

Marie Cannon, principal at St. Anthony, explained that Chapter 2 books such as "Mary the Mother of Jesus," "The Story of Baptists," "The Escape from Egypt," and "Adam, the Story of Creation," were ordered and received by a volunteer mother at St. Anthony's. S.J. Vol. VI, Cannon Dep. at 144. According to Cannon, books are ordered from catalogs that are sent directly to the school by book publishers and supply houses which, after they are ordered by the Jefferson Parish Public School System ("JPPSS"), are sent directly to the school by the book publisher. *Id.* at 129-30.

Daniel Lewis, the individual in charge of the Chapter 2 program for the Louisiana Department of Education, explained the problem in relying on sectarian school personnel. He testified that in "non-public schools, you have turnover of the primary people that are responsible for this program," and "the new people coming in are not always knowledgeable about the requirements of Chapter II." S.J. Vol. I, Lewis Dep. at 139.

When asked about monitoring, Lewis testified he tried to monitor one-third of the State's school districts each year and that during the monitoring of the district, he would visit one or two nonpublic schools within the district. S.J. Vol. I at 103-04. He acknowledged that unless there was some special problem, the State would only get to each LEA about once every three years. *Id.* at 104-05. He further testified that LEAs were required to make a monitoring visit at least once annually but acknowledged the State had no check list they

required the LEAs to follow. He also acknowledged the State did not receive any report of the monitoring visits made by LEAs. *Id.* at 105.

With regard to his monitoring of instructional equipment use, he agreed he would not be able to determine whether an overhead projector was used in a religion class or for sectarian purposes. *Id.* at 106-07.[2] He also testified there is no way to determine if computers are being diverted to sectarian use. S.J. Vol. II, Lewis Dep. at 44-45.

JPPSS Chapter 2 administrator, Ruth Woodward, testified she makes only one monitoring visit per year to each nonpublic school. And, unlike *Agostini* where unannounced visits are made monthly, the nonpublic school is notified one month in advance of the visit. S.J. Vol. II, Woodward Dep. at 119-20. She also testified the only way she can determine how the Chapter 2 equipment has been used is to ask the school's contact person. *Id.* at 102-03. She believes compliance with the guidelines prohibiting sectarian use of equipment is essentially self-reported by the nonpublic schools. *Id.* at 94.

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[2]Audio-visual equipment is just as usable in a theology course as in a secular class. A "Comparative Use of Audio-Visual Equipment Chart" included as an attachment from Archbishop Chapelle High School to Leonard Fine of the Archdiocese dated January 2, 1985, and made a part of the nonpublic program final evaluation for 1984-85 by the JPPSS, S.J. Vol. II, Woodward Dep. Ex. 21, shows the theology department was one of the highest users of the audio-visual equipment at Archbishop Chapelle. The department used the equipment 917 times during the 1984-85 school year, and 1,162 times during the 1983-84 school year.

But such self-screening by the sectarian school is suspect. At St. Anthony's, the principal only "glanced" at the total to see if it was within the amount allocated to the school under Chapter 2, and she did not review the list of books ordered to see what books were actually being ordered. In fact, no one other than the volunteer saw the entire list. S.J. Vol. VI, Cannon Dep. at 37-38.

Woodward also testified there is no procedure to disseminate the guidance prohibiting sectarian use of equipment beyond the single Chapter 2 contact person (the librarian) at each nonpublic school. In this regard, she does not speak with any of the teachers who actually use the equipment to ensure that they comply with the guidelines or ascertain that they are even aware of the guidelines. *Id.* at 126.

REASONS THE WRIT SHOULD BE DENIED

Introduction

Petitioners assert an amorphous "neutrality" argument which this *Court has repeatedly rejected*. This Court should thus deny the petition and leave standing the Fifth Circuit's Judgment declaring the Chapter 2 instructional materials program, 20 U.S.C. §§ 7301-7373, is unconstitutional *as applied* in Jefferson Parish, Louisiana.

Not one of the cases cited by petitioners, including the recent *Agostini v. Felton*, 117 S. Ct. 1997 (1997), supports petitioners' flawed theory. Petitioners theorize that the providing of tax-derived aid directly to pervasively sectarian schools through a neutral general benefit program insulates that program from Establishment Clause attack.

Under petitioners' theory, it would be constitutionally permissible for the government to give sectarian schools libraries, desks, and copy machines. Further, petitioners falsely infer that the Fifth Circuit's decision found Chapter 2 itself unconstitutional (*see* Pet. at 17) thereby affecting the quality of education to over a million nonpublic school children spread throughout the United States. (*See id.* at 14.) In fact, the decisions below relate only to the constitutionally flawed *administration* of Chapter 2 in *one* Louisiana parish school district. *See* Pet. App. 53a, 71a.

Both Judge Heebe, the trial judge originally finding the Jefferson Parish Chapter 2 program to be unconstitutional, and the Fifth Circuit faithfully applied an unbroken line of authority by this Court as is found in *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977). These dispositive legal conclusions have *never* been overruled by this Court, and for reasons hereafter stated should not be reviewed and overturned in this case.

Even if, *arguendo*, petitioners are correct in their legal argument, which respondents reject, the Judgment of the court below is fully supported by the record. The alleged conflicting decision of the Ninth Circuit in *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995), *reh'g and reh'g en banc denied*, 62 F.3d 300 (9th Cir. 1995), is distinguishable from this case on their facts. Petitioners ignore the finding by Judge Heebe, who first granted summary judgment as to Chapter 2, that there was no pre-screening of the library books as to their non-sectarian content before they were loaned to the parochial schools. Pet. App. at 150a. Judge Heebe also concluded that the educational equipment provided to parochial schools in Jefferson Parish were essentially the same as this Court found to be necessarily divertable in *Public Funds for Pub. Sch. v. Marburger*, 358

F. Supp. 29 (D. N.J. 1973), *aff'd mem.*, 417 U.S. 961 (1974). Pet. App. at 150a-51a.

Argument

1. Petitioners boldly contend that *Meek v. Pittenger*, 421 U.S. 349 (1975); and *Wolman v. Walter*, 433 U.S. 229 (1977) (the bases of the Fifth Circuit's holding) are not applicable here because those cases relate to aid "targeted" only at children attending religiously affiliated schools. Pet. at 23-24. Clearly, this is not the reasoning behind this Court's holding in those cases.

In fact, this assertion is contradicted by this Court itself in *Meek*. The *Meek* Court found the law there furthered the State's goal of "*extending the benefits* of free educational aids to every schoolchild in the Commonwealth, including nonpublic school students. . . ." 421 U.S. at 363 (emphasis supplied). Even the dissent in *Meek* rejected petitioners' concept. *Meek*, 421 U.S. at 389-90 (Rehnquist, J., concurring in the judgment in part and dissenting in part). *See also Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 802-03 (1973) (Burger, C.J., concurring in part and dissenting in part).

Petitioners argue that *Meek* and *Wolman* were decided in a decade of the '70s where the Court strayed from principles first enunciated in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), and *Board of Educ. v. Allen*, 392 U.S. 236 (1968). However, petitioners misread this Court's Establishment Clause cases. Supreme Court decisions beginning with *Everson* and continuing to the present have used and continue to use the direct/indirect aid analysis.

Everson found constitutional a school district program which

reimbursed parochial school parents for transportation costs. The Court distinguished between indirect benefits and direct aid to sectarian schools. Under the program, "[t]he state contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program *to help parents* get their children, regardless of their religion, safely and expeditiously to and from accredited schools." 330 U.S. at 18 (emphasis supplied).

In *Board of Educ. v. Allen*, 392 U.S. at 241-42, the Court did not ignore the no direct aid principle. Rather, it recognized while "*Everson* and later cases have shown that the line between state neutrality to religion and state support of religion is not easy to locate. 'The constitutional standard is the separation of Church and State. . . . '" *Id.* at 242.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court distinguished both *Everson* and *Allen* as indirect aid cases, stating:

> The Pennsylvania statute, moreover, has the further defect of *providing state financial aid directly to the church-related school*. This factor distinguishes both Everson and Allen, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents -- not to the church-related school.

Id. at 621 (emphasis supplied). Justice Brennan amplified the distinction, observing in *Lemon*, 403 U.S. at 656:

> More important, since the textbooks in *Allen* had been previously provided by the parents, and not the schools, 392 U.S., at 244 n.6, 88 S. Ct. at 1926, no aid to the institution was involved. Rather, as in the case of the bus

> transportation in *Everson*, the general program of providing all children in the state with free secular textbooks assisted all parents in schooling their children.

In *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 753-54 (1976), the Court further explained the distinction between aid such as textbooks (which is indirect aid) and aid such as educational equipment and materials (which is direct aid), stating:

> Last Term, in *Meek v. Pittenger*, 421 U.S. 349 (1975), the Court ruled yet again on a state-aid program for church-related elementary and secondary schools. On the authority of *Allen*, it upheld a Pennsylvania program for lending textbooks to private school students. It found, however, that *Lemon I*, required the invalidation of two other forms of aid to the private schools. The first was the loan of instructional materials and equipment. Like the textbooks, these were secular and nonideological in nature. Unlike the textbooks, however, they were loaned directly to the schools. The schools, similar to those in *Lemon I*, were ones in which "the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. . . ." . . . Aid flowing directly to such "religion-pervasive institutions . . ." . . . had the primary effect of advancing religion.

Id. at 753.

Following *Meek* and *Wolman*, the Court in *Committee for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 656 (1980) (quoting from *Wolman*, 433 U.S. at 240), again focused on whether the aid was direct or indirect, stating: "'[the] nonpublic school does not control the content of the test or its result'; and here, as in *Wolman*, this factor 'serves

to prevent the use of the test as a part of religious teaching,' . . . thus avoiding the kind of direct aid forbidden by the Court's prior cases."

In *Mueller v. Allen*, 463 U.S. 388 (1983), relied on by petitioners, this Court again followed the direct/indirect aid analysis in sustaining a Minnesota tax deduction permitting parents of public and nonpublic students to deduct student tuition, textbooks, and transportation payments. The *Mueller* court significantly found: "[P]ublic funds become available only as a result of numerous private choices of individual parents of school-aged children." *Id.* at 399.

In *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 488 (1986), the Court concluded there was no direct aid flowing to the religious school as a result of State action. Again, in *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Court noted the importance of whether the aid is direct or indirect. The Court found the *Bowen* program, like *Witters, Mueller, Allen,* and *Everson* acceptable because it involved indirect grants of government aid as distinguished from aid programs involving direct grants. *Id.* at 610.

Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 11-13 (1993), followed the indirect aid cases' reasoning. The Court distinguished the direct grant to schools' rationale of *Meek* from the attenuated benefits rationale of *Mueller* and *Witters*. It carefully differentiated the attenuated financial benefits which might ultimately flow to parochial schools at issue in *Mueller* and *Witters* from the direct aid provided in *Meek*. Quoting *Witters*, 474 U.S. at 487, the Court concluded:

> "[T]he State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of direct subsidy to the religious school' from the

State."

Zobrest, 509 U.S. at 12. Leaving no ambiguity with regard to the unconstitutionality of a direct subsidy, even if only benefiting the "secular" courses, this Court, relying on *Meek*, 421 U.S. 366, stated:

> Substantial aid to the educational function of such schools, we explained, "necessarily results in aid to the sectarian school enterprise as a whole," and therefore brings about "the direct and substantial advancement of religious activity."

Id.

Contrary to petitioners' assertion, *Agostini* did not result in the radical change to the "no direct aid" principle petitioners claim it did. Justice O'Connor, *Agostini's* author, did not assert that the "neutrality" principle now has vanquished the no direct aid prohibition. Rather, she stated:

> While it is true that individual students may not directly apply for Title I services, it does not follow from this premise that those services are distributed "directly to the religious schools." . . . In fact, they are not. . . . Title I funds are instead distributed to a public agency (an LEA) that dispenses services directly to the eligible students within its boundaries, no matter where they choose to attend school.

117 S. Ct. at 2013 (first emphasis in original; second emphasis supplied). Justice O'Connor in *Agostini* thus concluded that the services provided were *not* direct aid to the sectarian institution, but rather aid that bypassed the sectarian school and only directly aided the student. This is vastly

different from a program where, as here, the educational equipment, materials, and supplies (the day-to-day working tools for teachers and staff) are selected by and placed under the immediate control of sectarian school authorities.

Further, both Justices Kennedy and O'Connor in *Rosenberger,* 515 U.S. at 842, left no doubt that the "neutrality" argument advanced by petitioners here does not trump direct aid proscriptions. Justice Kennedy stated:

> The Court of Appeals (and the dissent) are correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions. . . . The error is not in identifying the principle but in believing that it controls this case.

And Justice O'Connor also noted the fallacy of petitioners' neutrality argument when, in *Rosenberger*, she stated:

> In *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, . . . (1986), for example, we unanimously held that the State may, through a generally applicable financial aid program, pay a blind student's tuition at a sectarian theological institution. The Court so held, however, only after emphasizing that "vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice." *Id.* at 487. . . . We thus resolved the conflict between the neutrality principle and the funding prohibition, not by permitting one to trump the other, *but by relying on the elements of choice peculiar to the facts of that case*: "The aid to religion at issue here is the result of petitioner's private choice. . . ."

Id. at 848 (O'Connor, J., concurring). As if to underscore this point, Justice O'Connor later observed:

> The Court's decision today therefore neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence.

Id. at 851. Justice Souter in *Rosenberger* also noted that "[e]ach of these cases involved a general aid program that provided benefits to a broad array of secular and sectarian institutions on an evenhanded basis, but in none of them was that fact dispositive." *Id.* at 884 (Souter, J., dissenting).

However, petitioners attempt to avoid the "no direct aid" proscription set forth in *Meek* and *Wolman* and the consistent line of reasoning in this Court's Establishment Clause precedent by claiming the Jefferson Parish Chapter 2 program apes the programs violated in *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481 (1986); and *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). They argue that any benefit that ultimately goes to religious institutions does so "only as a result of the genuinely independent and private choices of individuals," citing *Agostini*, 521 U.S. at 226. Pet. at 20-21. This flawed argument is based on the fact that the parents decide whether or not their child attends a public or sectarian school. But if this is all that the "private choice" exemption to the no-direct aid principle requires, the exception would surely swallow up the rule making all attempts to aid parochial schools valid. This is not what this Court meant, as the cases demonstrate, when it stated the Establishment Clause was not violated when the aid flows to the religious institutions "only as a result of the genuinely independent and private choices of individuals." *Agostini*, 117 S. Ct. at 2011-12.

Petitioners also distort this Court's *Agostini* reasoning by blithely skipping an essential element of that reasoning when they suggest only government aid that relieves the sectarian school of costs it would otherwise have borne is constitutionally impermissible. What *Agostini* actually said, 117 S. Ct. at 2011-12, was that the Supreme Court "departed from the rule . . . that all government aid that directly aids the educational function of religious schools is invalid," citing *Witters*. The *Agostini* Court quite logically explained that "the Establishment Clause did not bar a State from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a Christian college" because even though the grants were disbursed directly to students, "this transaction was no different from a State's issuing a paycheck to one of its employees, knowing that the employee would devote part or all of the check to a religious institution." *Id.*

According to *Agostini*, "[t]he same logic applied in *Zobrest* where 'the interpreter's presence in a sectarian school was a "result of the private decision of individual parents."'" *Id.* at 2012. But the critical point ignored by petitioners is that in *Witters* and in *Zobrest* the direct aid "[could] not be attributed to state decisionmaking." *Id.* Of course, the Establishment Clause only applies to acts by a government or its officials, not private parties.

This Court then added that in addition to the fact that the state was not a decisionmaker in *Zobrest* "[b]ecause the private school would not have provided an interpreter on its own, *we also concluded* that the aid in *Zobrest* did not indirectly finance religious education by 'relieving the sectarian school of costs [it] otherwise would have borne in educating [its] students. *Id.* at 12, 113 S. Ct. at 2468." *Agostini*, 117 S. Ct. at 2012 (emphasis supplied).

Petitioners attempt to distinguish between funds and equipment and materials. Petitioners argue, without demonstrating the constitutionally relevant distinction between funds and materials, that "no funds go to religious schools under Chapter 2." Pet at 22. But as Justice O'Connor stated in *Rosenberger v. Rector & Vicars of Univ. of Va.*, 515 U.S. 819, 862 (1995) (O'Connor, J., concurring):

> If the Establishment Clause is offended when religious adherents benefit from neutral programs such as the University of Virginia's Student Activities Fund, it must also be offended when they receive the same benefits in the form of in-kind subsidies.

2. Petitioners argue that the writ of certiorari should be issued because there exists a split in the circuits. However, not only is the Ninth Circuit's decision wrong, it is distinguishable from this case on the facts, but the Judgment below is supported by the record and is consistent with this Court's excessive entanglement holding in *Marburger*. Petitioners erroneously state that in all relevant respects this case is identical to *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995), *reh'g and reh'g en banc denied*, 62 F.3d 300 (9th Cir. 1995). But in Jefferson Parish, unlike the Chapter 2 program as administered in San Francisco, the materials supplied have not been confined only to prescreened textbooks, instructional materials, and "locked" computer hardware and software not divertable to religious use. As already noted, library books and materials provided under Chapter 2 are not prescreened as to content. *See infra* at 2-3. Only the books' titles are noted. And the computers, unlike those in *Walker*, are "stand alone" computers capable of many functions. Ruth Woodward testified the computers were multi-functional and could be used to print church

bulletins. S.J. Vol. II, Woodward Dep. at 148-49.

The evidence in this case demonstrates that audio-visual equipment, such as overhead projectors, VCRs, etc., which are equally usable in religion class as in science class, are easily diverted to religious or general school administrative use. This Court has recognized that educational equipment which appears to be religiously neutral is "readily divertable to religious uses." *Meek*, 421 U.S. at 366 n.16; *Public Funds for Pub. Sch. v. Marburger*, 358 F. Supp. 29 (D. N.J. 1973), *aff'd mem.*, 417 U.S. 961 (1974). In *Marburger*, this Court noted:

> Although it is obvious that "supplies," "instructional materials," and "equipment" are inherently neutral, the uses to which they can be put are clearly varied. Most of these items obviously can be used with equal facility in the teaching of religious studies as well as they can be used for the teaching of secular-nonideological subjects.

Id. at 38-39.[3]

3. Petitioners contend that the divertable items supplied under Chapter 2 are safeguarded to ensure that Chapter 2 funds achieve the statutory purpose of providing only supplemental secular educational benefits in part because Chapter 2 materials must be "secular, neutral and nonideological" under 20 U.S.C. § 7372(a)(1). But this language is neither new nor sufficiently protective. In fact, the same restrictions were included in the statute struck down

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[3]This Court in *Meek*, 421 U.S. at 370 n.20, said the affirmance of *Marburger* was a decision as to the constitutionality of the challenged New Jersey law and that, as such, it was entitled to precedential value.

in *Marburger* and actually contributed to its constitutional infirmity because in order to ensure that the legislative intent was to be carried out "would involve entanglement between the church and State which the Establishment Clause of the First Amendment was intended to avoid." 358 F. Supp. at 39.

Not only does such statutory language generate entanglement concerns, as this Court noted in *Wolman*, such language does not even save it from having "the primary effect of providing a direct and substantial advancement of the sectarian enterprise." *Wolman*, 433 U.S. at 250. This is because "[s]ubstantial aid to the educational function of such schools . . . necessarily results in aid to the sectarian enterprise as a whole." *Id.* In fact, even if it could be argued that the materials and equipment are merely supplemental, the *Wolman* Court noted that the loaning of materials and equipment that *supplemented courses* provided by the school was a clearer case of unconstitutionality than were the facts in *Nyquist*, 433 U.S. at 251 n.17.

It is also clear that even if petitioners' "supplement and not supplant" argument were otherwise sound, the Chapter 2 program in Jefferson Parish does not fit within petitioners' theory because in Jefferson Parish the sectarian schools received aid supplanting costs they would have otherwise borne in educating their students. For example, Leonard Fine, Assistant Archdiocesan School Superintendent, explained how Catholic schools in Jefferson Parish depend on government aid to develop their school library resources. He testified:

> The monies that were allocated for Chapter 2 or state library books were used first and then if that library wanted additional volumes, then if monies were available

they would use those funds. In many cases, there were no funds available. They had to rely on Chapter 2 or the state library in order to furnish their libraries.

S.J. Vol., Fine Dep. at 131. But, of course, school libraries may not be maintained with a zero budget. Also, the Lutheran High School's Assessment Needs Report, submitted to justify its ordering video equipment, said the equipment was needed to meet increasing educational competition among area schools. S.J. Vol. II, Woodward Dep. Ex. 7.

The foregoing illustrates the safeguarding failure of the much-touted Chapter 2 requirement that Chapter 2 aid only "supplement," and not "supplant." But, in actuality, this statutory requirement was not designed to apply to items supplied to sectarian schools. The "supplement, not supplant" proviso in the Chapter 2 statute appears in 20 U.S.C. § 7371(b) and only restricts the use and allocation of "funds" by "[a] State or local educational agency" -- not sectarian schools. As the petitioners acknowledge, nonpublic schools receive no funds; rather, the in kind items are purchased and "loaned" to them.

Even the Louisiana Department of Education's Chapter 2 Guidelines states: "This means that an LEA may use Chapter 2 funds only to supplement the educational programs generally offered with *state* and *local* funds." (Emphasis supplied). But funds may not be used for an activity that would cause a decrease in *state* and *local* funds if that activity, absent Chapter 2 funds, is generally provided. Attachment D4 at 9 to Fed. Defs' Mem. in Opp. to Plfs' Mo. for Part. Sum. Jdgmt. *See* DOE 179, Vol. 15 at 3611-78.

Further, this Court said in *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 396 (1985), "there is no way of knowing

whether the religious schools would have offered some or all of these courses if the public school system had not offered them first." If it is difficult to determine what courses a school will offer, it is certainly impossible, without excessively intruding into the religious school's internal affairs, to determine what educational equipment, materials, and books would have been purchased by the school, the school's sponsoring church, or add-on tuition funds had federal and State funds not been provided. Thus, if the "supplement and not supplant" concept is applicable to sectarian schools, it must render the program unconstitutional because of the necessary excessive entanglement required.

Petitioners claim that books and materials provided under Chapter 2 in Jefferson Parish are chosen from a list prescreened for availability in both public and nonpublic schools. Pet. at 22. And they claim federal, State, and local officials have implemented effective screening and monitoring procedures that provide reasonable assurance that reference books and materials and equipment loaned for use by students attending nonpublic schools comply with the statute. Both assertions are contrary to the record and opinions below.

It is true that Judge Livaudais, in his January 28, 1997, Order and Reasons for overturning Judge Heebe's summary judgment concerning Chapter 2, stated:

> Intervenors note that library reference books purchased *pursuant to La. Rev. Stat. Ann. § 17:351* are ordered from lists approved by the Louisiana Board of Elementary and Secondary Education. Fine Deposition at 186 and Ex. 57. Books and instructional materials may only be ordered from *state-approved lists and sources.* Fine Deposition at 129 and Ex. 25. Intervenors argue that these safeguards are more than adequate to assure that the

funds are not used for religious purposes.

Pet. App. at 101a-102a. But this portion of Judge Livaudais' opinion related *only to library reference books and books and instructional materials under the State program*, **not** under Chapter 2.[4] In fact, the record clearly indicates that the nonpublic schools do not order books, materials, or equipment off of a pre-approved list and are not given any catalogs from which they must order. Woodward Dep. at 37-38; S.J. Vol. I, Lewis Dep. at 136-37.

Another so-called safeguard referred to by petitioners is the signed assurance from the nonpublic school officials that all material and equipment will be used in "direct compliance" with Chapter 2 and that "Chapter 2 activities, equipment, and materials will only be used for secular, neutral and nonideological purposes." Pet. at 8. Lewis testified that those assurances were merely statements of good intent. S.J. Vol. I, Lewis Dep. at 104.

Petitioners tout another purported safeguard: that title to the Chapter 2 materials and equipment remains with the public school (LEA) officials. Pet. at 6. But how the holding of

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[4]Since intervenors' petition does not involve the State program under La. Rev. Stat. Ann. § 17:351, but was briefly addressed in State defendants' Petition for Writ of Certiorari, this matter will be dealt with in reply to State defendants' Petition. Suffice it to say that under the State program, although reference books are to be purchased from an approved list, books and instructional materials could be ordered from any State-approved jobber. The State approval of a jobber of educational equipment and materials provides absolutely no guarantee as to the content or divertability to religious purposes such as was the case in *Allen*.

mere title to personal property can prevent improper use is difficult to understand. As suggested in *Wolman*, the statute itself engages in doublespeak since, under both *Wolman* and Chapter 2 in Jefferson Parish, the actual use of the property was placed under the immediate control of the sectarian school -- not the students or representatives of the LEA -- which in turn made the equipment, materials, and books available under their rules and procedures to sectarian school staff and in some cases to collective student use. According to *Wolman*, the "technical change in legal bailee" "would exalt form over substance." 433 U.S. at 250.

As the record undeniably demonstrates, actual monitoring by the State and local school district was lax, infrequent, announced, and completely insufficient to prevent diversion to sectarian purposes. *See infra* at 3-4. Petitioners' claim that State monitoring provides adequate protection rings hollow in light of the fact that this same State board of education was found by the same court in this same case to have been fatally deficient in the administration of the State required services reimbursement program which was patterned after the program found facially constitutional in *Regan*, 444 U.S. 646 (1980). *See* Pet. App. at 179a ¶ 38 which determined in part:

> The Superintendent of Education has failed to check the claim forms for substantive content, rather than just checking the forms for mathematical accuracy, the Superintendent of Education has failed to require the nonpublic schools to submit additional reports and documents to support applications for reimbursement which exceed the parameters, . . . the safeguards set forth in La. Rev. Stat. §§ 17:361-365 to ensure the reimbursement to the nonpublic schools is only for secular services have not been implemented. According to *Levitt* and *Regan*, this Court must be certain that the

> reimbursement provided by the State does not directly aid religious education, and that the reimbursement is for tasks that have "a secular purpose and primarily a secular effect." *Regan*, 444 U.S. at 657.

That program was so poorly administered that not one of the defendants appealed the ruling to the court of appeals.

Here, however, Chapter 2 equipment and materials selected by and provided to sectarian schools for their general educational use on an every day basis will be controlled by those sectarian staff members under whose care the Chapter 2 equipment is placed to aid the school's religious mission.[5]

4. Petitioners claim that the Chapter 2 program does not present any risk of "excessive entanglement" arguing that "[t]he annual monitoring visits by public school district employees, their screening activities, and the biennial visits by Louisiana monitors to religiously-affiliated schools, . . . are far less intrusive than the monthly on-site visits the Court has held in *Agostini* do *not* involve 'excessive entanglement.'" Pet. at 23. The difficulty with petitioners' argument is that the existing monitoring of educational equipment and materials, including computers, all of which may be diverted to religious purposes, is not sufficient to guarantee against the diversion which concerned this Court in *Marburger, Meek* and *Wolman*. In order for the monitoring to be sufficient, it would have to be much greater than the prior infrequent monitoring. For monitoring of such items to be constitutionally sufficient, it

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[5]Petitioners analogize the furnishing of computers and computer software to pervasively sectarian institutions to activities of public libraries. Ignored is the fact that public libraries are not controlled and operated with a religious mission in mind.

would have to be ongoing and intrusive.

The entanglement concern is also much different in an *Agostini*-type program where the visits are of public supervisors to prevent or detect the inculcation of religion by public employees than, as here, when public employees are required to ferret out exactly how educational equipment, materials, library books, resources, and supplies are in fact used by sectarian school staff.

Clearly, it is equally difficult to separate the sectarian from the secular aspects of the teaching classroom and to effectively monitor to ensure that the Chapter 2 items will not advance the religious mission of the school for a number of reasons. First, at least in some schools, such as at St. Lawrence the Martyr, the religion teacher enters the classroom where secular courses are taught to teach religion while the regular teacher has a planning period. S.J. Vol. VI, Kropog Dep. I at 165. Thus, a log as to the items' classroom usage or the permanent placement of a computer in such a classroom would provide no assurances. Second, some topics may to some be deemed to be secular while to others religious. For instance, at St. Anthony School, resources persons are invited into the regular classroom such as representatives from the "Right to Life" organization, S.J. Vol. VI, Cannon Dep. at 57. Third, at Archbishop Chapelle High School, no attempt is made to compartmentalize the teaching of religion within a certain class period. Alvin Murphy, President of Archbishop Chapelle High School, testified:

> Our teachers, whether they are religion teachers or not, are certainly instructed that when issues come up in the classroom that have a religious, moral, or value concept, that their answers be consistent with the teachings of the Catholic Church and that they respond in that way to the

students, so that there can be opportunities in other classes other than religion where discussions of religion could take place. . . .

S.J. Vol. V, Murphy Dep. at 27.

The Court in *Lemon v. Kurtzman*, 403 U.S. 602, 618 (1971), "recognize[d] that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." The items obtained under Chapter 2 are inanimate objects and may be used for either secular or religious purposes depending upon how the sectarian school staff decides to use the items. *The fact that religiously-dedicated staff at a sectarian school at all times control the use of the Chapter 2 items* distinguishes this case from *Agostini*. In fact, in *Regan*, 444 U.S. at 656, the Court spoke to the "control" factor:

> As in *Wolman v. Walter*, 433 U.S., at 240, 97 S. Ct. at 2601, "[t]he nonpublic school does not control the content of the test or its result;" and here, as in *Wolman*, this factor "serves to prevent the use of the test as a part of the religious teaching," *ibid*, thus avoiding the kind of direct aid forbidden by the Court's prior cases. The District Court was correct in concluding that there was no substantial risk that the examinations could be used for religious educational purposes.

5. In arguing the correctness of the district court's 1997 decision, petitioners cite *Committee for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 661-62 (1980), for the proposition that *Meek* and *Wolman* do not forbid all loans of secular instructional materials and equipment to students attending religiously-affiliated schools. This argument was

advanced in *Walker* upon which petitioners rely.

Judge Reinhart, in his vigorous dissent to the denial of the rehearing en banc by the Ninth Circuit in *Walker*, clearly articulates the fallacy of petitioners' position. In debunking the claim that subsequent cases have thrown the *Meek/Wolman* holding into question, Judge Reinhart stated: "*Regan*, however, expressly relies on the rationale set forth in *Wolman* and concludes that testing services in secular subjects (unlike projectors, televisions, and tape recorders) could not be used for religious purposes. *Id.* at 661-62. Thus, *Regan* is founded on and reinforces the *Meek/Wolman* distinction." 62 F.3d at 302.

In a footnote Judge Reinhart further demolishes the argument that *Regan* undermined *Wolman* and *Meek*, stating:

> In support of its view that *Regan* undermined the distinction between secular textbooks and other equipment, the panel majority notes that *Regan* cited with approval a statement from Justice Powell's concurring opinion in *Wolman*. 46 F. 3d at 1466. In *Wolman*, Justice Powell stated: "I am not persuaded, nor did *Meek* hold, that all loans of secular instructional material and equipment 'inescapably [have] the primary effect of providing a direct and substantial advancement of the sectarian enterprise.'" 433 U.S. at 263 (Powell, J., concurring). The majority does not, however, quote the rest of Justice Powell's statement:
>
> > The Court [in *Meek*] expressly reaffirmed *Allen*, thereby necessarily holding that at least some such loans of materials helpful in the educational process are permissible -- *so long as the aid is incapable of diversion to religious uses, and so long as the*

> *materials are lent to the individual students or their parents and not to the sectarian institutions.*
>
> *Id.* (citation omitted, emphasis added). Thus, in Justice Powell's judgment, the aid provided here would be unconstitutional, for *two* independent reasons. First, the District provides equipment that is capable of being diverted to religious uses. Second, the District provides the aid directly to sectarian institutions rather than to students.

Id. at 302 n.2.

6. Petitioners mislead this Court by suggesting that Chapter 2 is designed to ensure that all school children have access to supplementary educational resources and equipment. Pet. at 14. And "the school children carry their [Chapter 2] entitlement wherever they go." *Id.* at 21. It is true that the allocation is made on a per pupil basis, but it is not true as the petition infers that the expenditures are made for the individual use of each student. For example, to the extent that Chapter 2 funds were provided in Jefferson Parish for public school students experiencing behavioral problems, there is a decrease in the funds available for those students who exhibited acceptable behavior. When funds are used for teacher training, the amounts for students are also decreased.

In many instances, the program excludes benefits usable by a majority of the student population. The decision as to how the funds will be expended is made by parochial school officials applying factors totally unrelated to any attempt to equalize the Chapter 2 benefits among the sectarian school population. This is unlike the textbook program in *Allen* where each child (or the child's parent) would benefit equally by receiving items to be individually used by each member of

the student population. This, of course, again demonstrates that Chapter 2 is direct aid to the sectarian school.

7. It is respectfully submitted that the program as administered in Jefferson Parish, Louisiana, decided originally on a motion for summary judgment with a factual record closed over a decade ago, is not the appropriate case to re-examine the validity of the direct/indirect aid analysis relied on by this Court for over one-half century. Nor is it a permissible vehicle for the U.S. Department of Education to adjudicate the facial validity of Chapter 2, the adequacy of its 1999 guidance and recommended safeguards. As pointed out in the brief of plaintiffs-appellants filed in the Fifth Circuit at 22, plaintiffs presented evidence in the district court that there was no prescreening of the items selected by the sectarian schools and furnished to them by the JPPSS under the local Chapter 2 program.

To the extent that the Establishment Clause at least requires sufficient safeguards to assure that Chapter 2 funds are used only to provide for the secular, nonideological benefits contemplated by the statute, which was apparently embraced in *Walker*, a further trial record would have to be developed. *See* Brief of Secretary of Education filed with this Court suggesting remand. Brf. of Sec'y at 27 n.16.

Respondents suggest that adequate safeguards to protect against Establishment Clause violations cannot be satisfied by reference to those found sufficient in *Agostini* because of the difference in the nature of the two programs. The difference is between a program, such as that under Title I where remedial services are provided by public school teachers using equipment and material constantly under their lock and control and supervision in rooms within the parochial school but free from sectarian symbols, from the program implemented in

Jefferson Parish where items necessary for the operation of a school are selected by and furnished to sectarian schools and used by the staff of the schools and the students within the controlled atmosphere and functions of the school's educational mission.

8. Petitioners present the beguiling claim that the decision below "consigned those who attend religiously affiliated schools to the use of textbooks under the program, while children of other taxpayers are using graphing calculators to solve polynomial equations and reading about the latest in Mesopotamian architectural discoveries on CD-ROMs." Pet. at 15. But this argument, as attractive as it is, when carefully analyzed, is seriously flawed. First, the proscriptions of the First Amendment may not be circumvented by the introduction of popular programs. But also the circuit court's holding does not prevent parochial school students from receiving many important and congressionally approved Chapter 2 services so long as they are provided directly to the student by *pubic school officials or contractors*, which is what the Chapter 2 statute provides.

Under 20 U.S.C. § 7372(c)(2), *services* are to be "provided by employees of a public agency or through contract by such public agency with a person, an association, agency, or corporation who or which, in the provision of such services, is independent of such private school and of any religious organizations, and such employment or contract shall be under the control and supervision of such public agency, and the funds provided under this title shall not be commingled with State or local funds." Admittedly, this may not be welcomed by sectarian schools who wish to use tax funds to meet necessary standards for a school library or to provide the sectarian school teachers with teaching tools they would otherwise have to fund to competently function in the "school

marketplace." It would, however, eliminate the constitutional risk and would be clearly in accordance with this Court's recent teaching in *Agostini*.

In Jefferson Parish, public school students participated in such programs. Although part of the funds for Jefferson Parish public school students included a computer literacy curriculum, a portion of the Chapter 2 funds were used for tutorial services for incoming high school freshmen and social work services for those students who had been suspended more than twice or drawn suspensions for the duration of the academic year. The Chapter 2 program for public school students has emphasized the meeting of the needs of students with behavioral problems by providing counseling, in-house suspension programs, and other alternatives to suspension. S.J. Vol. I, Lewis Dep. Ex. 2 at 99.

The more petitioners press their argument that computers and CD-ROMs are essential and an integral part of the teaching tools for a school to function, the stronger they make respondents' case that Chapter 2, as administered in Jefferson Parish, is providing substantial aid to the religious mission of the sectarian school. And, yes, if computers, why not desks, blackboards, and copiers? Where would the line be drawn? And would the decision be made by each LEA as to whether the item would or would not have been provided by non-Chapter 2 funds?

What petitioners attempt to do here is impose a new untried test urged by those seeking to minimize the Establishment Clause. *See* McConnell, *Accommodation of Religion: an Update and a Response to the Critics*, 60 Geo. Wash. L. Rev. 685 (March, 1992); Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 Notre Dame L. Rev. 151 (1987). But

Professor Beschle acknowledges such a new test will present new difficult questions with regard to "where to draw the line between equal assistance and impermissible preferences." *Id.* at 182. He states that such an analysis "would require serious reworking of present doctrine [in school aid cases]." *Id.* at 184. But such a major change in this Court's jurisprudence should be based upon a facial, not an as administered, challenge.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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Respectfully submitted,

NICHOLAS P. MILLER
110 N. Washington Street
Suite 404
Rockville, MD 20850
(301) 294-8766

LEE BOOTHBY
Counsel of Record
Boothby & Yingst
4545 42nd Street, NW, Suite 201
Washington, DC 20016
(202) 363-1773

Counsel for Petitioners